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March 26, 2004

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**RECEIVED**

MAR 26 2004

**PUBLIC SERVICE  
COMMISSION**

**VIA HAND-DELIVERY**

Thomas M. Dorman  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
Frankfort, Kentucky 40601

**RE: An Adjustment Of The Gas And Electric Rates, Terms And Conditions Of  
Louisville Gas and Electric Company**  
**Case No. 2003-00433**  
**Our File No.: 1/294**

Dear Mr. Dorman:

Enclosed please find and accept for filing the original and ten copies of the Reply Of Louisville Gas And Electric Company In Support Of Motion To Withdraw Document And Further Response To Attorney General's Motion To Compel in the above-referenced matter. Please confirm your receipt of this filing by placing the stamp of your Office with the date received on the enclosed additional copies and return them to me in the enclosed self-addressed stamped envelope.

Should you have any questions or need any additional information, please contact me at your convenience.

Very truly yours,

Kendrick R. Riggs

KRR/jmn  
Enclosures  
cc: Parties of Record

COMMONWEALTH OF KENTUCKY

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BEFORE THE PUBLIC SERVICE COMMISSION

MAR 26 2004

PUBLIC SERVICE  
COMMISSION

In the Matter of:

APPLICATION OF LOUISVILLE GAS AND	)	
ELECTRIC COMPANY FOR AN	)	CASE NO. 2003-00433
ADJUSTMENT OF THE GAS AND ELECTRIC	)	
RATES, TERMS AND CONDITIONS	)	

**REPLY OF LOUISVILLE GAS AND ELECTRIC COMPANY  
IN SUPPORT OF MOTION TO WITHDRAW DOCUMENT AND  
FURTHER RESPONSE TO ATTORNEY GENERAL'S MOTION TO COMPEL**

**I. The AG's Response to LG&E's Motion to Withdraw is Without Merit.**

In his response to the motion of Louisville Gas & Electric Company ("LG&E") to withdraw from the public record the inadvertently produced privileged document at issue, the Attorney General ("AG") focuses his argument on the claim that LG&E's motion should be denied because the inadvertently disclosed document was filed in the public record. That is not the point. The issue, rather, is whether the AG should be allowed a tactical advantage by being permitted to retain and use an inadvertently disclosed document which is otherwise privileged by established legal doctrine. The authorities cited in LG&E's Motion to Withdraw clearly hold that a party should not be permitted to gain a tactical advantage through the use of an inadvertently disclosed document, and that such a document should be returned to the producing party and treated as if no production had ever been made. KBA Ethics Opinion No. E-374; ABA Formal Opinion 92-368 (1992); *In re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance Incentive Factor*, Docket No. 03001-EI, 2003 WL 22765546 (Fla. PSC, 2003).

The AG argues as if there has been some mass circulation of the document at issue to the public at large, and that is simply not the case. Although a copy of the document was placed in the public record when the document was filed with the Commission as part of its larger production of discovery responses, there is absolutely no proof that the document has been further disseminated to the public. Indeed, it is highly unlikely, given the size of the production at issue, that any further dissemination whatsoever has in fact been made. Moreover, and most importantly, the AG has cited no authority whatsoever in support of his position that the mere fact that an inadvertently disclosed document is also inadvertently placed in the public record somehow waives the privilege otherwise applicable to that document. The same public policy which weighs heavily in favor of the preservation of the privilege for an inadvertently disclosed document weighs strongly in favor of preserving the privilege when a document has been inadvertently placed in the public record.

LG&E is certainly not, as the AG claims, trying to play some sort of “shell game” in this case. It is undisputed that LG&E, in a production of thousands of pages, made an inadvertent production of one e-mail which, on its face, was privileged and not responsive to the request to which it was attached. LG&E sought to remedy the situation as soon as it became known by first contacting all counsel of record and trying to secure an agreement regarding the return of the document.<sup>1</sup> When the AG objected to that effort and moved to compel discovery, LG&E promptly moved the Commission to have the document removed from the public record.

LG&E is simply trying to preserve the privileged nature of a document which was inadvertently disclosed. It is the AG, unfortunately, who is trying to play the game of “Gotcha” by arguing that once an inadvertent disclosure is made in a proceeding before the Commission,

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<sup>1</sup> In response to that effort, counsel for KIUC (the party whose data request was being responded to when the inadvertent disclosure was made), the Department of the Army, Metro Human Needs Alliance, People Organized

any privilege is waived and the opposing parties may make use of the document regardless of ethical obligations and long-standing jurisprudence requiring that a waiver must be knowing and voluntary. Such an argument, if it prevails, will only serve to punish parties who make inadvertent disclosures as part of an effort to fully and timely respond to voluminous discovery requests within the procedures and deadlines set by the Commission.<sup>2</sup>

## **II. The Attorney General's Motion to Compel is Also Without Merit.**

The AG's argument that it should be able to conduct further discovery on the inadvertently disclosed document is based entirely on its claim that the Commission should refuse to order the document removed from the public record. For all of the reasons set forth above, that argument is without merit and the document at issue should be removed from the public record, all copies should be returned to LG&E, and no further use should be made of the document. For the same reasons, the Commission should not permit further discovery flowing from the inadvertently produced document.

**WHEREFORE**, Louisville Gas and Electric Company respectfully requests the Commission to grant its motion to withdraw from the public record the privileged document located at page 428 of 441 of the attachment to its response to the request for information of KIUC, Item No. 1-78. Further, LG&E requests that the Commission deny the Attorney General's Motion to Compel Discovery on the grounds set forth above.

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and Working for Energy Reform, Kentucky Division of Energy, and Kroger all recognized the inadvertent nature of the disclosure voluntarily returned the document in question to LG&E.

<sup>2</sup> Such a ruling could also have a negative impact on other counsel. For example, the undersigned has, on one previous occasion, received an inadvertent production of a privileged document from Staff Counsel. Pursuant to KBA Ethics Opinion No. E-374, that document was promptly returned to Staff Counsel by the undersigned, and no other use was made of that document.

Dated: March 26, 2004

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing Motion was served on the following persons on the 26th day of March 2004, by United States mail, postage prepaid:

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